

PROCEDURAL ISSUES IN BANKRUPTCY APPEALS

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There are often numerous opportunities for appeals within a single bankruptcy case, with a number of final orders from which appeals can be taken being entered prior to plan confirmation or some other case dispositive event. These are orders that in “normal” plaintiff-versus-defendant (P v. D) litigation would be viewed as interlocutory, yet are appealable in bankruptcy cases. In addition, because bankruptcy courts are Article I courts, see Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), there are two levels of intermediate appellate review of bankruptcy court orders – by the District Court or the Bankruptcy Appellate Panel in the first instance, and by the Circuit Court of Appeals thereafter. Thus, bankruptcy appellate practice can be quite unlike appellate practice in the typical P v. D litigation, where there is usually only one appeal, at the end of the case following a dispositive ruling or entry of judgment, and only one level of intermediate review.

Because of the intervening (as opposed to interlocutory) nature of many bankruptcy court orders, and the vast number of parties who participate in a typical bankruptcy proceeding, there are a number of traps for the unwary that arise in bankruptcy appellate litigation. These include narrower concepts of standing than those typically presented by P v. D litigation; issues that are more likely to become moot between the time of the initial court order and the time that an appeal is heard; the somewhat unique bankruptcy appellate doctrine of equitable mootness; and the increased importance of obtaining a stay pending appeal. In Sections I and II, this article discusses a few of these procedural differences, and highlights some ways in which appellees may be able to defeat an appeal on procedural grounds. In addition, Section III details the recent

BAPCPA amendments that permit litigants in certain circumstances to short circuit the arduous bi-level appellate process and seek direct review from the Court of Appeals.

I. JURISDICTIONAL AND PRUDENTIAL LIMITATIONS

A. Appellate Standing In Bankruptcy Proceedings

Standing in bankruptcy appeals is more narrowly construed than Article III standing. See, e.g., Spenlinhauer v. O'Donnell (In re Spenlinhauer), 261 F.3d 113, 117 (1st Cir. 2001) (standing in bankruptcy appeals is delimited "more stringently than the doctrine of Article III standing"). Whereas typical Article III standing exists so long as the appellant's rights are "fairly traceable" to the alleged actions at issue, to obtain bankruptcy appellate standing, there must be a "financial" component to the injury that would be suffered by the appellant if it were not permitted to appeal a lower court decision. See, e.g., Travelers Ins. Co. v. H.K. Porter Co. (In re H.K. Porter Co.), 45 F.3d 737, 741 (3d Cir. 1995) (contrasting bankruptcy appellate standing with Article III standing which "need not be financial and need only be 'fairly traceable' to the alleged illegal action"); Kane v. Johns-Manville Corp., 843 F.2d 636, 642 n.2 (2d Cir. 1988) (same).

The First Circuit has provided a clear definition of what constitutes financial injury for the purposes of determining appellate standing. Only a "person aggrieved," *i.e.*, a person whose rights or interests have been "directly and adversely affected pecuniarily," has standing to appeal a bankruptcy court order. In re El San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987). The other Circuits have uniformly adopted the "person aggrieved" test for bankruptcy appellate standing. See In re Westwood Cmty. Two Ass'n, Inc., 293 F.3d 1132, 1335 (11th Cir. 2002); In re Troutman Enter., Inc., 286 F.2d 359, 364 (6th Cir. 2002); McGuirl v. White, 86 F.3d 1232, 1234-35 (D.C. Cir. 1996); In re Dykes, 10 F.3d 184, 187 (3d Cir. 1993); In re Andreuccetti, 975 F.2d

413, 416 (7th Cir. 1992); Holmes v. Silver Wing Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989); In re Cosmopolitan Aviation Corp., 763 F.2d 507, 513-14 (2d Cir. 1985); In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983).

This heightened standing requirement is driven by the nature of bankruptcy cases, which tend to be procedurally and administratively unwieldy, and often involve a myriad of parties who may be directly or indirectly affected by any particular order. See San Juan Hotel, 809 F.2d at 154. If the impact of an order on a party is indirect, or if reversal will not materially change the party's financial situation, standing will be lacking. Accordingly, courts have determined that standing is absent for debtors, where there is no tangible or quantifiable estate interest to protect; creditor bodies, where there is no likelihood that reversal of the order would result in any additional moneys for them; and other parties-in-interest who might conceivably have to expend money defending against litigation in the future should the bankruptcy court order not be reversed.

Litigants should not confuse the relatively lenient standard governing a party's right to contest a motion before the bankruptcy court under section 1109 ("a party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter"), with the more rigorous standing requirements on appeal. Thus, just because the bankruptcy court entertains a party's objection to a motion does not mean that the appellate courts will do so after that objection is denied, and First Circuit courts have willingly dismissed appeals where appellants have failed to carry their burden of showing that the challenged order directly affected their pecuniary interests. See, e.g., Davis v. Cox, 356 F.3d 76, 93-94 & n.15 (1st Cir. 2004) (debtor lacked standing to appeal order permitting disbursement of escrow funds where funds were not property of estate and debtor had only a contingent interest in funds); Spenlinhauer, 261 F.3d at

117 (debtor lacked standing to appeal from § 363 sale order where there was no prospect of surplus to the debtor); Wynn v. Braunstein (In re Wynco Distribs., Inc.), No. 94-1448, 1995 U.S. App. LEXIS 3623, at *6 (1st Cir. Feb. 24, 1995) (debtor's minority shareholders alleged no cognizable injury as a result of § 363 sale order where there was no evidence sale was chilled); San Juan Hotel, 809 F.2d at 155 (former trustee had no standing to appeal order authorizing suit against him where only interest was as a potential future defendant); Orion Fitness Group, LLC v. River Valley Fitness One Ltd. P'ship, No. 03-474-JD, 2004 WL 524430, at *1 (D.N.H. Mar. 17, 2004) (creditors who proposed unsuccessful plan but whose claims were to be paid in full under confirmed plan, lacked standing to appeal confirmation order); Austin Assocs. v. Howison (In re Murphy), 288 B.R. 1, 5 (D. Me. 2002) (accountants lacked standing to object to assignment of estate's litigation claims against them absent evidence of bad faith, fraud, or collusion); Cofield v. Graham (In re Malmart Mortgage Co.), 166 B.R. 499, 501-02 (D. Mass. 1994) (hopelessly insolvent Chapter 7 debtors lacked standing to object to fee applications); Kemper Life Ins. Co. v. Bezanson (In re Medomak Canning Co., Inc.), 123 B.R. 671, 673 (D. Me. 1991) (interpleader-plaintiff lacked standing to object to order approving settlement among defendants which did not release claims against plaintiff); Great Road Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc.), 304 B.R. 547, 550-51 (B.A.P. 1st Cir. 2004) (insolvent Chapter 7 debtor lacked standing to object to fee applications or assert "fraud on the court"); Alfaro v. Vazquez (In re Benitez), 221 B.R. 927, 932 (B.A.P. 1st Cir. 1998) (debtor suffered no harm from bankruptcy court's denial of request that a second lawyer represent him at hearing).

Because of the limited standing present in bankruptcy appeals, it is critical for a party whose standing to appeal a bankruptcy court order is challenged to develop sufficient evidence showing that the order directly affects its pecuniary interests. Such a showing should be made

early in any proceeding, as standing is ordinarily a fact question for the lower court. See El San Juan, 809 F.2d at 154 n.3. But even if the lower court does not make this determination, appellate courts may find, in the first instance, that an appellant has standing, provided that there is evidentiary support in the record. See, e.g., In re Depoister, 36 F.3d 582, 585 (7th Cir. 1994) (based on schedule of assets and liabilities, Chapter 7 debtor had standing to appeal order approving trustee's settlement of claims with other parties, even though district court did not make that determination); In re Martin, 817 F.2d 175, 177 & n.2 (1st Cir. 1987) (debtors had standing to appeal order invalidating pre-petition mortgage where appeals court determined that immediate sale of property could be avoided if mortgage was held valid).

B. Article III Mootness

The doctrine of Article III mootness may present another jurisdictional limitation in bankruptcy appellate proceedings. Broadly speaking, the doctrine limits judicial power where no effective remedy can be provided. See, e.g., Flester Publishing v. Burrell (In re Burrell), 415 F.3d 994, 998 (9th Cir. 2005) ("If the controversy is moot, both the trial and appellate courts lack subject matter jurisdiction . . . and the concomitant 'power to declare law' by deciding the claims on the merits."); Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co. of N.H.), 963 F.2d 469, 471 (1st Cir. 1992) ("Mootness in bankruptcy appellate proceedings . . . is premised on jurisdictional and equitable considerations stemming from the impracticability of fashioning fair and effective judicial relief."). As with standing, an appellate court has an independent obligation to consider mootness at the outset. See Burrell, 415 F.3d at 997.

Mootness frequently arises in bankruptcy appeals when a stay pending appeal has not been obtained (see Part II infra) and performance under the challenged order has proceeded to the point where a judicial ruling would have no practical effect on the controversy. This

typically occurs in connection with section 363 sales, where the parties have closed on the transaction, or materially changed their position, prior to the appeal being heard. See, e.g., Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.), 895 F.2d 845, 849 (1st Cir. 1990) (appeal of order authorizing § 363 sale was moot where appellant failed to request stay pending appeal and sale was completed); Palermo v. Pritam Realty Corp. (In re Pritam Realty Corp.), 233 B.R. 619, 624 (D. P.R. 1999) (same). Mootness can also arise, however, in other situations. See, e.g., Mountain Peaks Fin. Servs., Inc. v. Shepard (In re Shepard), 328 B.R. 601, 604-05 (B.A.P. 1st Cir. 2005) (collateral attack on Chapter 13 plan dismissed as moot and barred by res judicata; appellant did not appeal or seek stay of confirmation order); Benitez, 221 B.R. at 930 & 934 (dismissing as moot appeal of order denying appellant's request to have counsel whose retention was not approved by court appear at hearing, where debtor did not seek stay pending appeal and debtor was represented at hearing by other counsel who had been approved by court).

Even though the failure to obtain a stay alone is not sufficient for a finding of mootness, Public Serv. Co., 963 F.2d at 473, it is a critical factor, and prospective appellants should be warned to investigate what events might transpire following entry of the disputed order. Thus, where it is possible that subsequent events might moot an appeal, appellants should diligently pursue all available avenues to obtain a stay. Cf. id. (“[W]hether through oversight or ‘procedural ineptitude’ . . . appellants failed to ‘pursue with diligence all available remedies to obtain a stay of execution of the objectionable order’ . . .”).

Mootness may also occur through no fault or inaction by an appellant. For example, if pending an appeal the lower court issues another order which undermines the challenged order, the appeal will become moot. See, e.g., Burrell, 415 F.3d at 996-97 (vacating district court order affirming bankruptcy court decision not to deny Chapter 7 debtor's discharge, where bankruptcy

court subsequently denied discharge on other grounds); Shaddock v. Rodolakis, 221 B.R. 573, 579 (D. Mass. 1998) (appeal of order lifting automatic stay became moot when bankruptcy court subsequently denied Chapter 7 discharge, thereby dissolving stay, while appeal was pending). A bankruptcy appeal will also be moot on arrival; even if timely, where the remedy requested would have no practical effect. See Bank of Boston v. Wallace, 218 B.R. 654, 656 (D. Mass. 1998) (dismissing as moot lender's challenge to bankruptcy court's authority to enter show cause order with respect to reaffirmation agreement where agreement was ultimately approved).

Whether dismissal of an underlying bankruptcy case will moot an appeal depends on the matter being appealed. Dismissal will moot the appeal of an order granting relief from the automatic stay. See Gorczakoski v. E. Airlines Fed. Fin. Credit Union, 39 F.3d 1166, No. 94-1499, 1994 WL 591607, at *1 (1st Cir. Oct. 28, 1994) (citing cases). But dismissal does not moot an appeal of a Section 362(h) action for willful violation of the automatic stay, which survives dismissal. See Jones v. Boston Gas Co. (In re Jones), 369 B.R. 745, 748 (B.A.P. 1st Cir. 2007) (citing cases).

There are four exceptions to the Article III mootness doctrine.¹ Nevertheless, these exceptions rarely arise in bankruptcy appeals. In a recent case, however, the District Court for the District of Rhode Island held that an appeal of a cash-collateral order was not moot because it raised issues that were “capable of repetition yet evading review,” a recognized exception to Article III mootness. Bank Rhode Island v. Pawtuxet Valley Prescription & Surgical Ctr., Inc., - F. Supp. 2d --, 2008 WL 1727580, at *1 n.1 (D. R.I. Apr. 11, 2008). In this decision, even

¹ The exceptions are (i) there are secondary or collateral injuries; (ii) the issue is a wrong capable of repetition yet evading review; (iii) the defendant voluntarily stops the allegedly illegal practice but is free to resume it any time; and (iv) the action is a properly certified class action. See Shaddock, 221 B.R. at 579 n.10.

though the debtor's financial circumstances changed during the pendency of the appeal, the court found that the appeal was not moot because issues of adequate protection and equity cushion would be relevant as long as the debtor was using cash collateral. *See id.*

C. Equitable Mootness

Equitable mootness has been described as the prudential "cousin" of the Article III mootness doctrine. *Pritam Realty*, 233 B.R. at 624. The equitable mootness doctrine permits dismissal of an appeal, even though effective relief could conceivably be fashioned, if implementation of that relief would imprudently upset a confirmed plan or other court-approved transaction. *See In re Continental Airlines*, 91 F.3d 553, 559 (3d Cir. 1996).

Equitable mootness is concerned less with the technical question of whether effective relief can be fashioned, and more with the practical consequence of the requested relief on third-parties that relied on plan confirmation, asset sale orders or similar types of orders. As a result, the doctrine increases the likelihood that an appeal seeking to overturn an essential element of a "substantially consummated" plan, *see* 11 U.S.C. § 1101(2), or other transaction will be dismissed, especially where no stay was sought or obtained.

The First Circuit's equitable mootness test entails two similar but distinct inquiries:

- (i) whether a "repeated failure to request a stay enabled developments to evolve in reliance on the bankruptcy court order to the degree that their remediation has become impracticable"; and
 - (ii) whether an "order has been implemented to the degree that meaningful appellate relief is no longer practicable even though the appellant may have sought a stay with all due diligence."
- Hicks, Muse & Co., Inc. v. Brandt (In re Healthco Inter'l, Inc.)*, 136 F.3d 45, 49 (1st Cir. 1998). The first inquiry concerns an appellant's lack of diligence, while the second addresses the court's ability to "unscramble the egg." *See id.* (equitable mootness "imports both 'equitable' and

'pragmatic' limitations upon our appellate jurisdiction over bankruptcy appeals"). The other Courts of Appeals have adopted similar tests for equitable mootness. *See, e.g., Bank of Montreal v. Official Comm. of Unsecured Creditors (American Homepatient, Inc.)*, 420 F.3d 559, 563 (6th Cir. 2005) (factors are whether (1) a stay has been obtained, (2) a plan has been substantially consummated, and (3) the relief requested would affect the rights of parties not before the court or the success of the plan); *Continental Airlines*, 91 F.3d at 560 (factors are whether (1) confirmed plan has been substantially consummated, (2) stay has been obtained, (3) relief would affect the rights of parties not before the court, (4) relief would affect the success of the plan, and (5) public policy of affording finality to bankruptcy judgments would be contravened); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (equitable mootness "asks whether it is prudent to upset the plan of reorganization at this late date").

As with Article III mootness, obtaining a stay pending appeal is a material, though not dispositive, factor in the equitable mootness analysis. The primary focus appears to be on the second part of the test -- whether granting the requested relief could require unwinding complicated transactions, executed in reliance on an order, and thus creating "a nightmarish situation for the bankruptcy court on remand." *Public Serv.*, 963 F.2d at 474. When facing such a potential outcome, a court is more likely to dismiss an appeal as equitably moot. *See, e.g., Continental*, 91 F.3d at 565 (appeal was equitably moot where "investors and third parties consummated massive reorganization in reliance on unstayed confirmation order"); *Public Serv.*, 963 F.2d at 475 ("unraveling the substantially consummated . . . plan would work incalculable inequity to many thousands of innocent third parties who have extended credit, settled claims, relinquished collateral and transferred or acquired property in legitimate reliance on the unstayed order of confirmation"); *Pritam Realty*, 233 B.R. at 624 (appeal of sale order was equitably moot

where asset sold “was the most important component of debtor’s plan of reorganization”); In re Eastern Co., 148 B.R. 367, 371-72 (D. Mass. 1992) (appeal of order placing Chapter 7 debtor in involuntary bankruptcy was equitably moot as liquidation had advanced too far).

In contrast, courts, including First Circuit appellate courts, have eschewed equitable mootness when they have determined that they would be able to fashion a practical remedy. See, e.g., Healthco, 136 F.3d at 49 (appeal of approved settlement not equitably moot in absence of showing that “settlement proceeds disbursed to Trustee, or to persons employed by the Trustee, could not be recovered with relative ease”); Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 492 (1st Cir. 1997) (appeal of confirmation order was not equitably moot where plan was a “much less complex enterprise” and was substantially consummated recently in relation to the date of appeal); Massachusetts Hous. Fin. Agency v. Evora, 255 B.R. 336, 340 (D. Mass. 2000) (appeal by mortgagor of order denying motion to revalue collateral was not equitably moot even though Chapter 13 debtor was permitted to refinance mortgage); United States v. Sterling Consulting Corp. (In re Indian Motorcycle Co., Inc.), 261 B.R. 800, 806 (B.A.P. 1st Cir. 2001) (appeal of order authorizing distribution from Trustee’s account to a creditor who is party to appeal is not equitably moot, where creditor can be ordered to return distribution).

II. MOTIONS FOR STAYS PENDING APPEAL

As discussed above, obtaining a stay pending appeal may be crucial in preserving the justiciability of bankruptcy appeals. Fed. R. Bankr. P. 7062 (making applicable Fed. R. Civ. P. 62) governs stays pending appeals from adversary proceedings, while Fed. R. Bankr. P. 8005 applies to stays pending appeal with respect to other bankruptcy matters.

The text of these two rules differs in that Rule 8005 explicitly provides that a motion for a stay “must ordinarily be presented to the bankruptcy judge in the first instance,” whereas there

is no express requirement that a Rule 7062 motion must be filed initially in the bankruptcy court. As a matter of practice, however, Rules 7062 and 8005 are read together, and it is strongly recommended that any motion under Rule 7062 be presented first to the bankruptcy court. See, e.g., 10 Collier on Bankruptcy, ¶ 8005.03 at 8005-4 (15th ed. Rev. 2007); In re Davis, 160 B.R. 577, 580 (Bankr. E.D. Tenn. 1995) (Rule 7062 motion should first be presented in bankruptcy court).

Substantively, the standard for granting a stay pending appeal under either Rule 8005 or Rule 7026 is the same as the standard for issuance of a preliminary injunction. See, e.g., Elias v. Sumski (In re Elias), 182 Fed. Appx. 3, 2006 U.S. App. LEXIS 13684, at *2 (1st Cir. June 2, 2006) (the “courts below properly applied the traditional four-part test standard applicable to preliminary injunctions in determining whether to grant a stay pending appeal” under Rule 8005); In re Access CardioSystems, Inc., 340 B.R. 656, 659 (Bankr. D. Mass. 2006); In re Public Serv. Co. of N.H., 116 B.R. 347, 348 (Bankr. D.N.H. 1990). Thus, to obtain a stay pending appeal, a party must show that (i) there is a likelihood of success on the merits of the appeal; (ii) the moving party will suffer irreparable harm if the stay is not granted; (iii) the harm to the moving party if the stay is not granted is greater than the injury to the opposing party if the stay is granted; and (iv) the public interest would not be adversely affected by the issuance of the stay. See, e.g., Elias, 182 Fed. Appx. 3, 2006 U.S. App. LEXIS 13684, at *2; Access CardioSystems, 340 B.R. at 659.

As a rule, the “likelihood of success on the merits” prong is not interpreted literally by bankruptcy courts, as to do so would require that the court effectively say “that it decided the case improperly and should be reversed.” Public Serv., 116 B.R. at 348. Rather, courts have interpreted “likelihood of success on the merits” to mean that a movant must show that it has a

“substantial case” or a “strong case on appeal.” See, e.g., In re Albicocco, No. 06-3409, 2006 WL 2620464, at *1 (E.D.N.Y. Sept. 13, 2006) (movant needs only to demonstrate “a substantial possibility, although less than a likelihood, of success on appeal”); In re Deep, 288 B.R. 27, 30 (N.D.N.Y. 2003) (same); In re General Credit Corp., 283 B.R. 658, 659-60 (S.D.N.Y. 2002) (same); Access CardioSystems, 340 B.R. at 660 (requiring only “substantial” or “strong” case on appeal); Miraj & Sons, Inc., 201 B.R. 23, 26-27 (Bankr. D. Mass. 1996) (same); Public Serv., 116 B.R. at 348-49 (same).

As discussed below, there is also a split of authority as to whether a movant must satisfy all four prongs of the traditional four-part injunction test, or only certain elements.

A. Majority View

The majority of cases, including decisions by First Circuit bankruptcy courts, hold that the party seeking the stay bears the burden of proving that each of the four factors is satisfied. See, e.g., Morgan v. Polaroid Corp. (In re Polaroid Corp.), No. 02-1353, 2004 U.S. Dist. Lexis 1917 (D. Del. Feb. 9, 2004) (“If a party fails to establish one of the four prongs, a court may deny the requested stay.”); Deep, 288 B.R. at 30 (failure to satisfy one of the four elements “dooms the motion”); Green Point Bank v. Treston, 188 B.R. 9, 12 (S.D.N.Y. 1995) (same); Access CardioSystems, 340 B.R. at 660 (a “stay pending appeal should not be granted if any of the factors is entirely absent”); Miraj & Sons, 201 B.R. at 26 (same); In re Dial Indus., Inc., 137 B.R. 247, 249 (Bankr. N.D. Ohio 1992) (“the burden of proof is upon the party seeking the [Rule 8005] stay to establish each of these factors . . . by a preponderance of the evidence.”); Public Serv., 116 B.R. at 348 (four criteria must be proved); In re Great Barrington Fair & Amusement, Inc., 53 B.R. 237, 239 (Bankr. D. Mass. 1985) (same). Courts need not give equal

weight to each factor when determining whether to enter a stay pending appeal. See Access CardioSystems, 340 B.R. at 659.

B. Minority View

The minority view holds that the four prongs are not strict elements that each need to be satisfied, but factors that should be weighed against each other in equity. See, e.g., Albicocco, 2006 WL 2620464, at *1 n.2 (discussing apparent split among Second Circuit courts, some of which require that all four elements be satisfied while others treat inquiry as involving factors to be weighed); In re Westwood Plaza Apartments, Ltd., 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993) (four-part test is not a “rigid set of mandatory rules for a court to follow” when deciding motion for a stay under Rule 8005); In re Dakota Rail, Inc., 111 B.R. 818, 820 (Bankr. D. Minn. 1990) (“[T]he Court will treat these factors as interests to be considered and balanced in deciding whether to grant a stay rather than as absolute prerequisites for a stay”); In re Roth Am., Inc., 90 B.R. 94, 95 (Bankr. M.D. Pa. 1988) (stating “these four factors structure the inquiry. However, no one aspect will necessarily determine its outcome. Rather, proper judgment entails a ‘delicate balancing of all elements.’”).

III. DIRECT APPEALS CERTIFIED TO THE COURTS OF APPEALS

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) amended 28 U.S.C. § 158(d) to permit, in certain circumstances, a certified direct appeal of a bankruptcy court order to the court of appeals. See 11 U.S.C. § 158(d)(2). Among the reasons for this provision was “widespread unhappiness at the paucity of settled bankruptcy-law precedent” because “decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value.” Weber v. U.S. Trustee, 484 F.3d 154, 158 & n.1 (2d Cir. 2007) (citing House Report). Although the First Circuit has yet to

address the direct appeal amendment in a reported decision, other courts have, creating a road map for litigants who want to seek this expedited review.

A. Bankruptcy Court Orders Eligible For Direct Appeal

To be eligible for certification to a court of appeals, a final or interlocutory bankruptcy court order must meet one of three criteria:

- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A)(i-iii). According to the Second Circuit, these criteria make clear that the procedure should apply to “discrete, controlling question[s] of law” that are “not heavily dependent on the particular facts of a case.” *Weber*, 484 F.3d at 158.

The certification criteria under Section 158(d) are similar to the standard for certifying an appeal of a district court’s interlocutory order to a court of appeals. *See* 28 U.S.C. § 1292(b) (eligible order must (1) “involve a controlling question of law,” (2) “as to which there is a substantial ground for difference of opinion,” and (3) an “immediate appeal from the order may materially advance the ultimate termination of litigation”). There is, however, a major difference between the two statutes: while an appeal under Section 1292(b) must satisfy all three conditions, a direct appeal under Section 158(d)(2)(A) need only satisfy one of three.

B. Procedure For Certifying An Appeal

1. Timing. A timely appeal under Bankruptcy Rules 8001 and 8002 is a prerequisite to certification. *See* Interim Fed. R. Bankr. P. 8001(f)(1); *In re Hudson*, No. 06-12949-ESD,

2006 WL 4552815, at *2 (Bankr. D. Md. Sept. 11, 2006) (denying certification motion where no notice of appeal or motion for leave to appeal was filed). In addition, a certification request must be made not later than 60 days after entry of the judgment, decree, or other order. *Id.* at § 158(d)(2)(E).

2. Procedure. Once an order is timely appealed, a bankruptcy court, district court, or bankruptcy appellate panel “shall” certify an appeal if either (i) the court determines on its own motion or on the request of a party, that one or more of the three certification criteria exist; or, (ii) if a majority of the appellants and appellees request a direct appeal and certify that one of the three criteria are present. *See* 28 U.S.C. § 158(d)(2)(B)(i) and (ii). Thus, on the face of the statute, it appears that if the parties to the appeal agree that certification is appropriate, then certification to the appeals court is automatic and the lower court has no discretion to reject it.

The court of appeals has discretion to reject the direct appeal. *See* 28 U.S.C. § 158(d)(2)(A); *see also Weber*, 484 F.3d at 161 (“Congress has explicitly granted us plenary authority to grant or deny leave to file a direct appeal, notwithstanding the presence of one, two, or all three of the threshold conditions.”); *see also* Part III.D, *infra*. This appears to be the case whether certification is accomplished via subsection (B)(i) or (B)(ii).

3. Stay. A direct appeal does not stay any proceedings, unless a court issues a stay pending appeal. 28 U.S.C. § 158(d)(2)(D).

4. Who may certify. If a matter is still pending in the bankruptcy court, only a bankruptcy court may certify an appeal to the court of appeals. *See* Interim Rule 8001(f)(2)(A)(i). A matter is pending in the bankruptcy court until an appeal is docketed in either the district court or bankruptcy appellate panel pursuant to Bankruptcy Rule 8007(b). *See* Interim Rule 8001(f)(2). Nevertheless, a bankruptcy court may abstain from addressing a

request for certification of an interlocutory order if the appellant also files a motion for leave to appeal that order in the district court. See Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc., 360 B.R. 429, 434-35 (Bankr. D. Del. 2007) (refraining from acting on request for direct appeal because if district court granted motion for leave to appeal, bankruptcy court would be divested of jurisdiction over request for direct appeal).

Once an appeal is docketed, then only the district court or bankruptcy appellate panel, as applicable, may certify that appeal to the court of appeals. Interim Rule 8001(f)(2)(A)(ii).² Further, a bankruptcy court's denial of a certification request does not prohibit a party to a properly filed appeal from subsequently seeking certification from the district court or bankruptcy appellate panel. See In re Berman, 05-4225, 2007 WL 43973, at *2 (Bankr. D. Mass. Jan. 5, 2007) (stating that "Bankruptcy Court is not the final gatekeeper of this direct appeal process").

The Fifth Circuit addressed a potential pitfall involving Interim Rule 8001(f) in Ad Hoc Group of Timber Noteholders v. The Pacific Lumber Co. (In re Scotia Pacific Co. LLC), 508 F.3d 214 (5th Cir. 2007). There, appellants timely appealed to the district court and simultaneously requested that the bankruptcy court certify the appeal to the court of appeals. Id. at 218. But before the appeal was docketed in the district court under Rule 8007, each of the following occurred: the bankruptcy court recommended that the district court certify the appeal;

² The BAPCPA amendments and interim rules do not expressly address whether a district court or bankruptcy appellate panel may rule on an appeal while concurrently certifying that same appeal to the court of appeals. The Ninth Circuit BAP concluded that it had such authority when it affirmed a bankruptcy court's interlocutory order and then certified a direct appeal of the bankruptcy court's order to the Ninth Circuit. Ransom v. MBNA Am. Bank, N.A., 380 B.R. 809, 811-12 (B.A.P. 9th Cir. 2007) (stating that "we have the authority to certify the bankruptcy court's . . . order in this case notwithstanding the fact that we are concurrently issuing our Opinion affirming it.").

the district court certified the appeal; and the Fifth Circuit authorized the direct appeal. Id. The appellees contended that because the appeal was still pending in the bankruptcy court when the district court certified it, the wrong court certified the appeal in violation of Interim Rule 8001(f), and the direct appeal should be dismissed as improperly taken. Id. at 219.

The Fifth Circuit rejected appellees' procedural argument, stating that because Interim Rule 8001(f) was a "court-promulgated rule and not governed by statute, certification by the district court in this case did not deprive this Court of jurisdiction." Id. It also characterized the error as a "procedural glitch," that was "technical in nature," and which "d[id] not affect the substantial rights of the parties." Id. at 220. The court went on to affirm the bankruptcy court's decision on the merits. Id. at 224-25. It is not apparent from the Fifth Circuit's opinion whether its procedural ruling would have been any different had Interim Rule 8001(f) been a statutory mandate. Nevertheless, Scotia Pacific teaches that close attention should be paid to these new procedural rules, otherwise parties risk creating distracting, even if not fatal, appellate issues.

5. Retroactive Application. BAPCPA § 1501(b) (uncodified) provides that BAPCPA's provisions, with limited exceptions, "shall not apply with respect to cases commenced under title 11, United States Code, before the effective date of this Act." The majority of courts have interpreted BAPCPA § 1501 to mean that that the direct appeal provisions do not apply to appeals arising out of bankruptcy cases filed before October 17, 1995, BAPCPA's effective date. See, e.g., In re McKinney, 457 F.3d 623, 624 (7th Cir. 2006); Berman v. Maney (In re Berman), 344 B.R. 612, 615 (B.A.P. 9th Cir. 2006); Entrust NPL Corp. v. Winchester Global Trust Co. Ltd., 380 B.R. 275, 276 (Bankr. S.D. Fla. 2007). In one case, however, a direct appeal was certified in a Chapter 7 case that was commenced prior to BAPCPA's effective date, although the specific issue of retroactivity was not confronted. See

In re Virissimo, 332 B.R. 208, 209-10 (Bankr. D. Nev. 2005) (appeal certified October 31, 2005, case commenced on April 25, 2005).

C. Application Of Criteria For Certifying Direct Appeals

There are relatively few reported lower-court decisions applying the criteria for certifying a direct appeal to a court of appeals. These cases confirm, however, that courts will determine if an appeal warrants certification on a case-by-case basis and that, consistent with the statutory language, an appeal may be certified even if it meets only one of the certification criteria. See, e.g., DaimlerChrysler Fin. Servs. Am., L.L.C. v. Waters, No. 07-00057, 2007 WL 2107428, at **2-3 (W.D. Va. July 18, 2007) (only addressing first criteria -- that an order allowing Chapter 13 debtor to surrender the creditor's collateral in full satisfaction of claim was a question of law as to which there was no controlling decision of the Supreme Court or Fourth Circuit); In re Elmendorf, 345 B.R. 486, 504 (Bankr. S.D.N.Y. 2006) (only addressing second criteria -- there was split among Second Circuit bankruptcy courts as to whether automatic stay is invoked by petition filed by ineligible debtor warranted certification); Berman, 2007 WL 43973, at *1 (refusing to certify direct appeal where Court was unable to find that any of the three criteria was satisfied); cf. Ransom v. MBNA Am. Bank, N.A., 380 B.R. 809, 811-12 (B.A.P. 9th Cir. 2007) (denial of confirmation of Chapter 13 plan that relied on tax deductions for expenses not incurred warranted direct appeal on account of all three criteria: issue affected "enormous" amount of prospective Chapter 13 debtors; there was "substantial conflict among the bankruptcy courts"; and resolution of issue may result in confirmation); Virissimo, 332 B.R. at 209-10 (the extent to which 11 U.S.C. § 522(p) limited homestead had "immense practical implication" and satisfied all three criteria justifying immediate appeal).

D. Application Of Standard Authorizing Direct Appeals

Having a direct appeal certified is, of course, no guarantee that it will be authorized by the court of appeals. 28 U.S.C. § 158(d)(2)(A). Decisions by the Second and Sixth Circuits strongly suggest that at least these two courts will exercise their discretionary jurisdiction over direct appeals sparingly. In Weber v. U.S. Trustee, the Second Circuit explained that it would be "most likely to exercise [its] discretion to permit a direct appeal where there is uncertainty in the bankruptcy courts"; or where it was "patently obvious that the bankruptcy court's decision is either manifestly correct or incorrect, as in such cases [the court] benefit[s] less from the case's prior consideration in the district court and [the court is] more likely to render a decision expeditiously, thereby advancing the progress of the case." 484 F.3d at 161 (no compelling reason to take direct appeal of order retroactively applying New York's homestead exemption). The court reasoned that the BAPCPA amendments were not intended "to privilege speed over other goals; indeed, speed is not necessarily compatible with our ultimate objective -- answering questions wisely and well." Id. at 160. The court further stated that "percolation through the district court [of a bankruptcy appeal] would cast more light on the issues and facilitate a wise and well-informed decision." Id. at 161 (also commenting that district courts tend to resolve bankruptcy appeals faster than courts of appeals).

The Sixth Circuit cited Weber approvingly in refusing to grant a direct appeal of an order denying confirmation of Chapter 13 plan, adding that in the case before it "material advancement is not a factor" and "the extent of the conflict [among courts] is unclear." In re Davis, 512 F.3d 856, 858 (6th Cir. 2008). The court did not provide any further guidance as to the circumstances under which it would be inclined to authorize a direct appeal.

The Seventh Circuit has also reported a decision authorizing a direct appeal. In In re Wright, 492 F.3d 829 (7th Cir. 2007), the court stated that a “clear answer” was needed to the question of whether 11 U.S.C. § 506, as amended, permitted a debtor to surrender collateral in full satisfaction of a claim. Id. at 831. The court authorized the appeal because “the issue not only has divided bankruptcy courts but also arises in a large fraction of all consumer bankruptcy proceedings”; “no court of appeals has addressed the subject, and few district judges have done so”; and “lower litigation costs for thousands of debtors and creditors may be achieved by expediting appellate consideration of this case.” Id. at 831-32 (ruling on the merits that amended § 506 did not deprive secured lender of a deficiency claim if claim amount exceeded value of collateral surrendered). This decision also tends to indicate that appellants will have to meet a high bar to persuade a court of appeals to authorize a direct appeal.